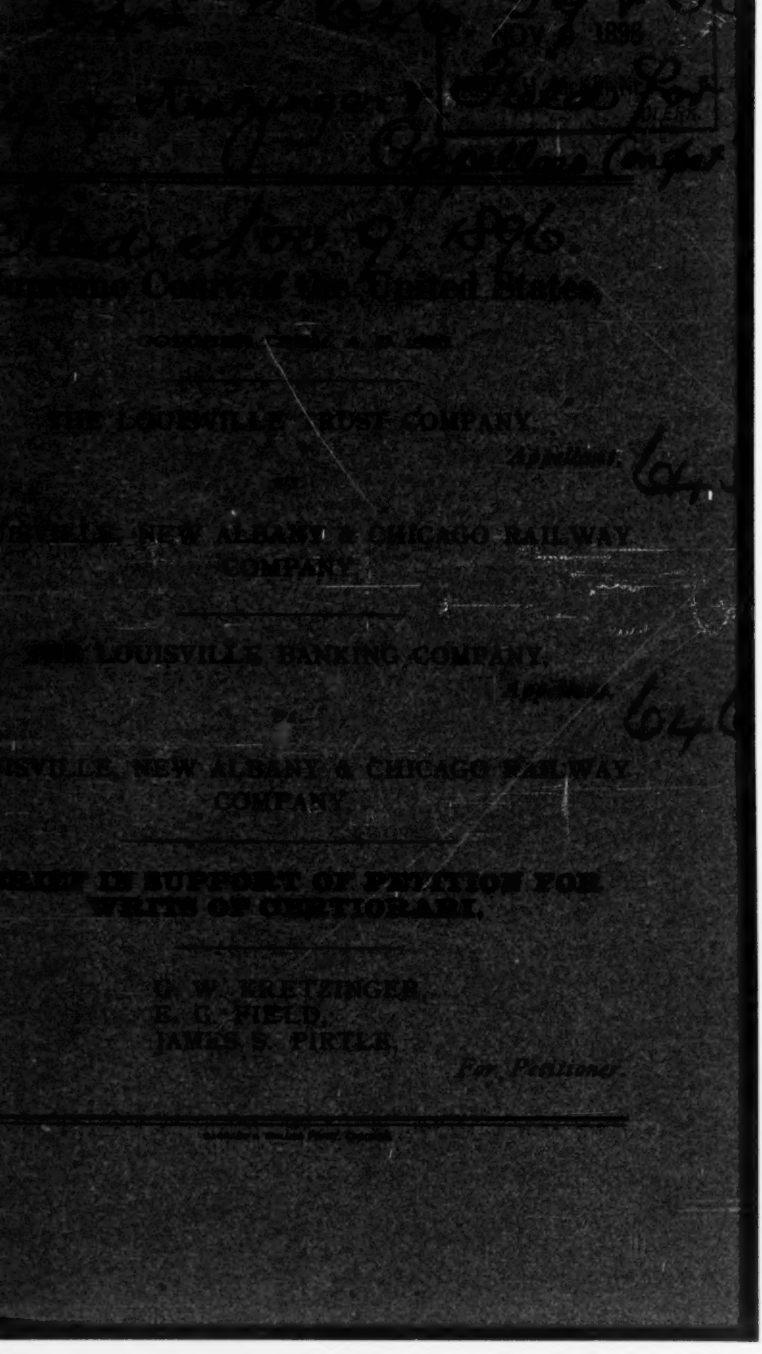

THE LOUISVILLE TRUST COMPANY,

Appellant.

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

and

THE LOUISVILLE BANKING COMPANY,

Appellant.

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

G. W. ERETZINGER,
E. G. FIELD,
JAMES S. PIRTLE,
For Petitioner.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,
Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

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POINTS AND AUTHORITIES

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

This suit involves the validity of an alleged guarantee, endorsed on 1185 Beattyville bonds of $1,000 each and interest from July 1, 1889.

The Circuit Court of Appeals act clearly vests in this court express judicial authority to grant a writ of *certiorari* in any case.

In *Law Ow Bew* v. *United States*, 144 U. S., p. 58, this court defined the class of cases in which the writ of *certiorari* should issue, in the following words:

"And as *certiorari* will only be issued when questions of gravity or importance are involved, or in the interest of uniformity of decision, the object of the act is thereby attained."

Here the record presents not only "*questions of gravity and importance*," but also conclusively shows that its review by this court is necessary to maintain "*uniformity of decision.*"

Some of the questions are and involve:

1st. Did the Kentucky act of 1880, *without* natural persons for incorporators and *without* provisions for stock, stockholders, directors or officers, create a Kentucky corporation which could become a corporate citizen of the State of Indiana, vested with Kentucky corporate powers for exercise.

The Circuit Court of Appeals answered this question

in the affirmative, which we submit is in conflict with *Railway Co.* v. *James*, 161 U. S., 545.

2d. *Under* this Kentucky act could petitioner as a corporation created by the consolidation of Indiana and Illinois companies, exercise powers inconsistent with or not granted by the laws of both Indiana and Illinois ?

3d. Did the Indiana act of 1883 authorize an interstate company of Indiana and Illinois to guarantee railroad bonds of an adjoining state so as to bind the entire property, franchises, income and earnings of such consolidated company in both states, or was it a domestic statute limited to Indiana domestic companies ?

4th. Under the Indiana act would the directors of an Indiana company have any authority, whatever, to direct a guaranty of the bonds of a Kentucky company *without* a petition from the stockholders in the manner and to the effect required in such statute.

5th. Does the mere election of directors to exercise general powers constitute any *apparent* authority *whatever* to exercise any special statutory power expressly vested in the stockholders ?

6th. Upon this record were the stockholders estopped from promptly upon first notice repudiating such guaranty attempted without their act or knowledge or were they estopped by the *mere* election of directors as general agents to exercise general powers ?

7th. Was *not* the guaranty here endorsed sufficien notice that it was for the debt of the maker of the bond and put the purchaser upon inquiry.

8th. May the public presume from the *mere* act of an agent that he has the requisite *special* authority to exercise a *special* statutory corporate power, especially

when the same is vested in a body, expressly named for exercise ?

No more important questions were involved in *Bank of Augusta* v. *Earle*, 13 pet., 519, than here presented. In fact the most important question in *that* case recurs in *this*, and in *that* case Mr. CHIEF JUSTICE TANEY said : "It will be seen that the questions brought here for decision *are of a very* GRAVE *character*, and they have received from the court an attentive examination", to which add a matter of transcendent "gravity and importance," *namely* the necessity of preserving the supremacy of the decisions of this court, and keeping in strict line and harmony with them the decisions of the nine Circuit Courts of Appeal.

We respectfully submit that the matters and questions arising upon the petition here presented, and their decision by the Circuit Court of Appeals *as shown*, are essentially sufficient under this Circuit Court of Appeal act, and as the same has been construed and restricted by this court, to entitle petitioner to the writ prayed.

But in further support of this petition and motion we submit the following points and authorities.

II.

THE KENTUCKY ACT OF 1880 DID NOT CREATE A CORPORATION. IT WAS NO MORE THAN AN ENABLING ACT OR LICENSE.

The holding of the Circuit Court of Appeals that this act created a corporation cannot be sustained upon principle or authority. All cases cited in the opinion upon that point are relieved of the interpretation and force given them by that court or are directly overruled by *Railway Company* v. *James*, 161 U. S., 545, which it cites in support of its holding.

That the Circuit Court of Appeals misread and misapplied *Railway Company* v. *James, supra*, and that its holding is in conflict with the decisions of this court *we submit*:

First. In this act the Kentucky legislature expressly dealt with the New Albany Company as "*a corporation organized and existing under the laws of the state of Indiana.*" (See section 1, Kentucky act of 1880, Ex. "A.") It was not dealing with the personal stockholders or incorporators of the Indiana company, but with the Indiana corporation itself. It made no provisions for stock, stockholders, directors or officers. The express and implied powers it vested were limited to the acquirement of terminal facilities in the county of Jefferson and city of Louisville. (See Section 2, Kentucky act, 1880, Ex. "A.")

This court held in *Railway Company* v. *James, supra*, "It should be observed that in the present case the corporation defendant was not incorporated as such by the state of Arkansas. The legislation of that state was professedly dealing with a railroad corporation of other states".

In *Railway Company* v. *Harris*, 12 Wall. 81, this court held that the Virginia act "*was a license and nothing more*", and so held because that act left the Maryland corporation "in its name, locality, capital stock, the election and power of its directors, in the mode of declaring dividends and doing all its business, *its unity was unchanged.*"

The Court of Appeals held, that, although the Kentucky company was not named in and was not a party to the articles of consolidation, it passed into such consolidation through the consolidation of Indiana and Illinois companies. *We submit*, if it was a Kentucky corporate entity, it could *not* so pass into this consolidation without so contracting as a constituent; *that if it did* pass into the consolidation *without* being a party to the agreement to consolidate *it was because* the Kentucky act was a mere license and followed its Indiana licensee.

But an essential factor in the creation and existence of a corporation is succession. Here no succession can occur. Upon the dissolution of the Indiana incorporator the Kentucky company must terminate. Again, such succession requisite and essential to corporate existence can only occur through stock, and successive stockholders, none of which are provided for in the Kentucky act.

Second. The Circuit Court of Appeals held that this court decided (*Ry. Co.* v. *James*) that the "Missouri company might be a corporation of Arkansas by virtue of the statute making it such," etc. It is clear that that court either overlooked or misinterpretated the following clear and unambiguous language of this court.

"It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas company did NOT *convert it* into an Arkansas

corporation;" that "it would be *necessary* to create it out of *natural* persons whose citizenship of the state creating it could be imputed to the corporation itself."

James v. *Railway*, *supra*, 564.

The Circuit Court of Appeals further held that, inasmuch as the *sole* incorporator of the alleged Kentucky company was an Indiana corporation, *no* presumption of its Kentucky citizenship could arise. Therefore, this *Kentucky* corporation was a corporate citizen of *Indiana*. (Opinion C. C. A. Rec., p. 168.) If this novel position is maintained, it conclusively follows that, instead of the Kentucky legislature creating a Kentucky corporation, it created an Indiana corporation, and vested it with Kentucky charter powers for exercise. *Such a conclusion is in direct conflict* with every decision of this court involving the citizenship of corporations, the power of one state to create a corporation in another, and that all corporations are incontrovertibly controlled, limited and restricted by the laws of the states creating them, and that they can only be deemed or taken as citizens of the states of their creation.

This principle, so tersely stated in *Bank* v. *Earle*, *supra*, has been repeated and approved in all subsequent decisions of this court involving this question, and was reaffirmed with judicial emphasis in *Railway Company* v. *James*, *supra*. Thus if, as there held, the Indiana corporation had "no legal existence" in Kentucky because it could not migrate—could not leave the state of its creation—it was never present in the State of Kentucky as a corporate entity for Kentucky incorporation, and in this attempted reincorporation it was not represented by any agent. It appears in the Kentucky act by its corporate name *alone*, notwithstanding by its

mere corporate name it is "a mere artificial being, invisible and intangible," and as such can *only* act by and through agents that are visible and tangible.

But upon the rule stated and the principle announced by this court in *Railway Co.* v. *James, supra*, the Kentucky legislature was powerless to create a corporation of Indiana, or to create one that can only be deemed or taken as a corporate citizen of Indiana and endow it with Kentucky corporate powers for exercise.

"And neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised." (*Ry. Co.* v. *James, supra.*) * * *

"It may, indeed, be composed of and represent, under the corporate name, the same natural persons."

Such an incorporation by the Kentucky legislature of natural persons by the same name—the name of the Louisville, New Albany and Chicago Railway Company—*is not before the court.*

III.

WITHOUT THE AUTHORITY AND CONSENT OF INDIANA THE NEW ALBANY COULD NOT ENTER INTO A CHARTER CONTRACT WITH THE STATE OF KENTUCKY, AND COULD EXERCISE NO POWERS IN KENTUCKY WHICH IT COULD NOT EXERCISE AT HOME.

A charter is a contract between the state and the incorporators. If the Kentucky act incorporated the Indiana corporation, using it as its Kentucky incorporator, it conclusively follows that the Kentucky charter is a contract between the State of Kentucky and this Indiana corporation.

In *Railway Company* v. *James*, *supra*, the court said:

"It is competent for a railroad corporation organized under the laws of one state, *when authorized so to do by the consent of the state which created it*, to accept authority from another state to extend its railroad into such state and *to receive a grant of power* to own and control by lease or purchase railroads therein and to subject itself to such rules and regulations as may be prescribed by the second state."

We deny that such Indiana statutory authority exists and respectfully submit that the court of appeals *mis*-interpreted the Indiana statute as well as the opinion of this court (*James* v. *Ry. supra*). The court of appeals cite and quote in its opinion the following clause from section 3,951 of the Revised Statutes of Indiana:

"May also purchase or contract for use and enjoyment, in whole or in part, of any railroad or railroads, lying within adjoining states; and may assume such of the debts and liabilities of such corporations as may be deemed proper," saying:

"The statutes of Indiana applicable to the company

also provided that 'every such railroad corporation should have capacity to hold, enjoy and exercise, *within* other states, the aforesaid faculties, powers, rights, franchises and inmunities, and such others as may be conferred upon it by any law of *this* state in any other state in which any portion of its railroad may be situate or in which it may transact any part of its business.' Revised Statutes of Indiana 3,949."

But observe that the contract in question was not made with the Beattyville Company—did not contemplate the acquirement of the Beattyville road by purchase, lease or consolidation. It was simply a contract with the Construction Company to purchase from it part of the Beattyville stock, and to guarantee the Beattyville bonds after such stock and bonds became the property of the Construction Company, through which neither petitioner or its Indiana constituent could have acquired any title to the Beattyville road or any part thereof as contemplated or authorized in the provisions of the Indiana statute here under consideration. In fact the Circuit Court of Appeals touching this question held:

"We are of opinion that the necessary effect of the act of 1883 was to require that thereafter where a guaranty was deemed a proper means in the exercise of power conferred by section 3951, it could only be used with the consent of a majority of the stockholders. Of this view was the Circuit Court, and we concur therein."

It conclusively follows, therefore:

1. That these Indiana statutes did *not* authorize petitioner to purchase the stock from the Contract Company and guarantee Beattyville bonds owned by it.
2. That the Indiana statute of 1883 did *not* authorize the purchase of the *stock* of a Kentucky company.
3. That *no* authority whatever can be found in any of these Indiana statutes which purports in any sense to authorize an Indiana legal entity to enter into a charter

contract with the State of Kentucky by the reincorporation of its corporate entity in that state, and as shown, no such corporation could be created or could exist without natural persons for incorporators.

Ry. v. *Harris* and *James* v. *Ry. Co.*, ***supra.***

4. No authority can be found in any of these Indiana statutes which authorized or purport to authorize any Indiana Company to exercise any Kentucky statutory corporate power *not* required in the operation of a road, or part of a road, in Kentucky which such Indiana Company might acquire by purchase, lease or consolidation.

Section 3945 to 3951 inclusive (quoted under Ex. "C"), provide for the incorporation of two distinct classes of railroad corporations with appropriate powers for exercise in the acquirement of title to foreclose railroads and the maintenance and operation thereof.

1st. For the incorporation of companies under Indiana laws to purchase at a foreclosure sale railroads *wholly* within the State of Indiana, the same being covered by the foreclosed mortgage.

2d. To purchase at foreclosure sale railroads partly within and partly *without* the State of Indiana, the whole being covered by the foreclosed mortgage.

Petitioner's Indiana constituent belonged to the first class and therefore was not controlled by the statute cited and quoted by the Circuit Court of Appeals.

Section 3945 makes this distinction clear. It provides:

"In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate an adjoining State, and embraced in the mortgage or mortgages or deed or deeds of

trust), it may be sold at one time and place, as an entirety," etc.

Section 3947 provides:

"Such corporation shall possess all the powers, rights, privileges, immunities and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this state or any other state in which any part of said railroad is situated, *not inconsistent with the laws of this state.*"

It would seem incredible that the Indiana legislature intended by section 3947 as so clearly expressed therein, to prohibit a corporation upon its organization to purchase at a foreclosure sale, from taking or exercising powers of the foreign mortgagor "*inconsistent*" with its home power, and then intended by implication to authorize it to exercise inconsistent foreign powers under section 3951, *especially* when clearly repugnant to the restrictions expressed therein. Such a holding would violate every well known rule for the construction and interpretation of statutes.

It is manifest from section 3951 that the additional power therein conferred to purchase a railroad which "in whole or in part" is in an "adjoining state," and to "assume such of the debts and liabilities of said corporation as may be deemed proper," does not furnish authority in words or by implication to purchase stock, or to guarantee the debt of a railroad *which it does not purchase.*

An assumption of a debt by the purchaser upon property purchased is a part of the purchase price and becomes the debt of the purchaser.

Again, the same section provides:

"All railroads purchased and branch roads constructed as aforesaid shall be vested in and become a part of the property of the corporation so purchasing or constructing the same as aforesaid, and shall be, in all things, governed by the laws, rules and regulations governing the corporation purchasing or constructing the same as aforesaid, and be operated as part of its line of road."

Thus a company wholly within Indiana that purchases a road, in part or in whole, in an adjoining state remains subject to the laws of Indiana, and operates such road in such adjoining state as a part of its Indiana line.

NO ONE OF THESE SECTIONS EXPRESS OR IMPLY AUTHORITY TO ASSUME THE DEBT OF A ROAD *not* LEASED OR PURCHASED.

IV.

Observe that the Indiana act of 1883 not only creates a special power, but expressly limits its exercise by the stockholders to special classes in Indiana and in adjoining states:

First. To Indiana companies whose lines extend across the state. *All others* were excluded from this limited and restricted special power and guaranty.

Second. Bonds in an adjoining state for guaranty were limited to the roads in such state that would in their construction and operation benefit such Indiana roads extending across the state. *All* bonds of *all* other roads in adjoining states were expressly excluded from this statute for guaranty, and thus the guarantee thereof was prohibited.

Until this question was determined, *namely*, until the stockholders by petition certified their decision to the directors that the Beattyville road would aid the traffic and business of the New Albany road, the Beattyville bonds were excluded or could not be deemed and taken as within this Indiana act for guaranty, and could not be brought within the provisions—the restricted and conditional authority thereof, by a *mere* presumption arising upon the manual act of an executive officer. The investigation of a railroad and thereon to decide whether its operation would be beneficial to the New Albany Company, and thus determine if its bonds would fall within the provisions of this statute for guaranty, involve the exercise of *quasi* judicial power. The legislature having expressly vested in the body of the stockholders this power, judicial in its nature, to decide as to what bonds

are guaranteeable under the statute, their decision is conclusive and ought not to be reviewed by the court.

Ry. Co. v. *Supervisors*, 48 N. Y., 97.
Ballinger v. *Gray*, 51 N. Y., 610.
Mayor v. *Davenport*, 92 N. Y., 604.

Until the Beattyville bonds were brought within this statute by such action by the stockholders, the directors had *no* more statutory authority to direct their guaranty than if such statute had *never been passed.*

Defendant's equities as alleged *bona fide* purchasers, depending *alone* upon blind presumptions *voluntarily* indulged, could not determine or cut off the statutory power vested in the stockholders to determine against the world the question as to whether the Beattyville road was within the statute for the guaranty of its bonds.

This record contains the express judgment of the stockholders by their repudiation of this contract and guaranty at their first opportunity that the Beattyville road in its operation would not benefit or aid the business or traffic of their company, and therefore the Beattyville bonds were not within the Indiana statute for guaranty. Every case cited in the opinion of the Circuit Court of Appeals in support of this guaranty or in finding a remedy thereon for the alleged *bona fide* purchasers have been repeatedly distinguished by this court from the one at bar, upon three grounds:

First, they arose under general powers conferred upon the corporation without restriction and without limitation as to class or subject.

Second, express power was expressly vested in the directors for exercise.

Third, in the exercise of such general powers the directors were authorized either expressly or by implication to issue negotiable paper to aid in the conduct of the

business of the corporate maker, or they contained recitals of due performance of the law sufficient to create and feed an estoppel.

In *Dixon Co.* v. *Field*, 111 U. S., 83, held:

"And the estoppel does not arise except upon matters of fact which the corporate officers had authority by law to determine and to certify."

Here, there were neither recitals in the guaranty or "authority by law" in the directors or executive officers to determine the vital statutory question which was committed by the legislature to the exclusive judgment of the stockholders.

V.

PETITIONER, CREATED BY THE CONSOLIDATION OF ILLINOIS AND INDIANA COMPANIES, COULD NOT BY GENERAL CONTRACT BIND ILSELF IF SUCH CONTRACT WAS PROHIBITED OR NOT AUTHORIZED BY THE STATE OF EITHER OF ITS CONSTITUENTS.

The Circuit court of appeals held "that the guaranty was, therefore, a valid obligation of the Kentucky corporation, enforceable against petitioner's property in Kentucky."

(Op. Cir. Court of Appeals, rec. p. 175.)

Suppose petitioner is sued upon this guaranty in Kentucky, would the judgment be limited in its enforcement to property in Kentucky, or would it not simply be a general judgment which could be enforced against the property and earnings of the consolidated Indiana and Illinois corporation? This guaranty, if valid, creates a general commercial debt. It was not authorized by Illinois statute and was, therefore, prohibited in that

state, *because* by withholding a power from a corporation, its exercise is forbidden.

Suppose suit is brought in an Illinois court upon a judgment rendered in a Kentucky court upon this guaranty, would such judgment be open to the defense that the guaranty was void under Illinois law? If not, it conclusively follows that if the opinion of the court of appeals is sustained, one state could enforce its legislation upon corporate constituents of consolidated companies in another state, and make courts of such other state powerless to enforce their prohibitory statutes.

We are confident that a doctrine so inconsistent and dangerous will find no support in this court.

State v. *Maine Central Ry. Co.*, 66 Maine, 488, involved this precise question. The court held (p. 497):

"The corporate rights of the new corporation are those derived from its charter—the act of consolidation—under and by virtue of which alone it began to be and is. * * * The corporations comprising it have no further power to control their assets or direct their own movements. The new corporation has its stock, its stockholders, its directors, precisely as if the individuals owning stock had organized to form a corporation. * * * Its corporate life dates from the day of its organization. * * * *The assets of both corporations have become commingled and united.* * * * The corporations out of which it is created cease to exist or exist only for special purposes. * * * (P. 511.) The new corporation would have only the privileges, powers and immunities which the corporation with the least powers, privileges and immunities possessed *and which were common to them all.*"

It is conclusive, therefore, that the Kentucky amendment, even if the New Albany became a Kentucky corporation and as such passed into the consolidation, and the Indiana act of 1883, remained as they were, local and domestic acts, and the powers therein vested could not be exercised by the consolidated company of Indiana and Illinois.

Upon the consolidation of two companies, a new one comes into existence and the constituents are dissolved or at least they cease to own or hold any corporate property or assets of any nature whatever and are incapable of binding the consolidated company or its property by contract.

Shields v. *Ohio*, 35 U. S., 319.
Railway Co. v. *Georgia*, 98 U. S., 359.
Clear Water v. *Meredith*, 1 Wall., 25.

How could the Kentucky Company bind petitioner, a corporation created by the consolidation of Indiana and Illinois Company, or, how could petitioner as such consolidated company bind the Kentucky Company, so as to reach through a judgment upon the guaranty here involved the property of petitioner—as an Indiana and Illinois corporation?

Yet the court of appeals held that your petitioner as such consolidated Indiana and Illinois company and the alleged Kentucky New Albany were jointly liable on the guaranty here involved and thereupon by express order directed that petitioner as such consolidated company of Indiana and Illinois should be released from the guaranty on forty-five of the bonds and that such guaranty should only be held binding against the Kentucky New Albany, and thus by judicial action making another and different contract between the parties than that originally entered into, even if the same were valid.

In *Railway Co.* v. *Berry*, 113 U. S., 465, this court held that a consolidation upon like terms and conditions adopted for the creation of petitioner made a new corporation, with an existence dating from the date when the consolidation took effect, and therefore privileges conferred upon one of the constituents by statute did not pass to such new company.

If a statutory privilege granted to one of the constituents could not pass to the new company, then a special power granted to such constituent could not.

VII.

The general and implied corporate powers of petitioner as a consolidated corporation, were limited by the articles and laws of its creation to the ownership and operation of railroads *wholly* within the States of Indiana and Illinois.

That both general and implied powers are restricted in their exercise to the corporate purposes expressed in the articles or charter. See

Thomas v. *Railway Co.*, 101 U. S., 82.
Oregon Ry. Co. v. *Oregon Ry. Co.*, 130 U. S., 1.
Ins. Co. v. *Rundell*, 103 U. S., 336.
Pierce v. *Railway Co.*, 21 How., 414.
Ernest v. *Nichols*, 6 House Lord cases, 418.
Balfour v. *Ernest*, 94 Eng. C. L., 600.
Ridley v. *P., G. & B. Co.*, 2 Exch., 711.
Railway Co. v. *Bowser*, 48 Pa. St., 29.
People ex rel., etc., v. *Chicago Trust Co.*, 130 Ill., 268.
Davis v. *Old Colony Ry. Co.*, 131 Mass., 258, and numerous cases therein cited.

The enumeration of these corporate purposes in these articles excluded all implied power not necessary to effectuate them.

See cases *supra*.

VIII.

Petitioner had no general power to lend its credit or guarantee the debts of any other enterprise or company.

"*It is no part of the ordinary business of corporations* and *a fortiori*, still less so of non-commercial corporations to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires, whether* in the direct form of giving accommodation bills or otherwise becoming liable for the debts of others."

Lucas, Cashier, etc., v. *White Line Transfer Co.*, 70 Iowa, 546.

See

Morawitz, Section 537.

Davis v. *Old Colony Ry. Co.*, *supra*, and cases cited in opinion.

Coleman v. *Ry. Co.*, 10 Beav., 1.

Ry. Co. v. *Ry. Co.*, 11 C. B., 775.

Pearce v. *Ry. Co.*, 21 How., 443.

IX.

All courts agree that it requires special legislative power to authorize the purchase of the stock or to guaranty the debt of any *other* company or enterprise, and when granted the same remains a special power and does not become one of the general powers of the company to acquire and operate the railroad mentioned in its charter or articles of incorporation.

In *Franklin County* v. *Bank*, 68 Me., 45, held :

"In the United States corporations *cannot* purchase or hold or deal in the stock of *other* corporations *unless* expressly authorized to do so by law. Green *Ultra Vires*, 95, and note citing a number of authorities. * * * If a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all of its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. * * * *This the law will not allow.*"

This precise question was involved in *People* v. *Chicago Gas and Trust Company*, 130 Ill., 268.

To the same effect see :

Sumner v. *Marcy*, 3 W. & M., 105.
Ry. Co. v. *Pierce*, 21 How., *supra.*
Bank v. *Agency Co.*, 24 Conn. Rep., 159.
Starin v. *Town of Genoa*, 23 N. Y., 439.

X.

THIS CASE INVOLVES THE LAW OF AGENCY AS WELL AS QUESTIONS OF CORPORATE POWER.

An agent exercising general powers within the limits of expressed corporate powers might be deemed and taken as the general agent of the company, and as such authorized to transact its *ordinary* business in the *usual* manner, but in the exercise of any *special* authority affecting any subject outside of these express corporate powers he must be deemed and taken as a *special* agent, and those dealing with him must take notice that his authority as such *special* agent is not *general* but limited, and *no presumption* will be substituted for actually absent special authority.

Starin v. *Town of Genoa*, 23 N. Y., 439.
Balfour v. *Ernest et al.*, 94 Eng. C. L., 600.
Pratt v. *Short*, 79 N. Y., 437.
Ry. Co. v. *Iron Co.*, 44 Ohio St., 44.
Hackensack Water Co. v. *DeKay*, 46 N. J. Eq., 548.
Martin v. *Mfg. Co.*, 9 N. H., 71.
Morawetz, Secs., 602, 604.
LeMoyne v. *Bank*, 3 Dill., 44.
Spence v. *Ry. Co.*, 79 Ala., 585.
Ernest v. *Nichols*, 6 House of Lords, 418.
Chambers v. *Railway Co.*, 5 B. & S., 17.

THE PUBLIC IS REQUIRED TO TAKE NOTICE OF THIS DIFFERENCE BETWEEN GENERAL AND SPECIAL AGENTS AND THEIR AUTHORITY.

A collateral guaranty is *unusual*, and therefore presumably *unauthorized*. The purchaser therefore is bound to take notice that general corporate agents ordinarily have no power by virtue of their offices as such, to fasten such liability upon the corporation and no presumptions will protect such guaranty.

The general rule is stated in *March* v. *Fulton Co.*, 10 Wall., 676.

"The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under a delegated authority, etc."

In *Bank* v. *Bergen*, 115 U. S., 391, held:

"The delegation must be first established before the doctrine can come in for consideration."

Thus the court applies the general rule applicable to commercial paper issued by an agent to determine not only the sufficiency of his authority to bind his principal, but as to whether such authority was in fact given. *Here* the stockholders gave no authority *whatever* to the directors without which they had no statutory authority to act, and no estoppel or presumptions could arise to relieve the purchaser from any inquiry or from acting at his peril.

The last utterance of this court on this subject is *Evansville* v. *Denett*, 161 U. S., p. 441.

Which re-affirms,

Buchana v. *Litchfield*, 102 U. S., 278;
School District v. *Stone*, 106 U. S., 183, 187.

To the same effect, see, *Thomas* v. *Railway Co.*, 5 B. & S. 117, E. C. L. Rep., 586, decided in the Exechequer Chamber, eight years after *Bank* v. *Turquand*, upon which the Circuit court of appeals relied with such confidence.

XI.

The court of appeals held that the consideration for the guaranty here at issue was for the benefit that might come to the traffic and business of petitioner as guarantor and thus fell within its general corporate powers.

The contrary is expressly held in *Davis* v. *Old Colony Ry. Co.*, *supra*, and numerous cases therein cited and in *Pierce* v. *Ry. Co.*, *supra*, and in cases *supra*.

XII.

The court of appeals held that the grant of this exclusive power to the stockholders which was equivalent to an express prohibition against its exercise by the directors, was a mere internal regulation, therefore equivalent to a by-law or secret resolution.

In *Beveridge* v. *Ry. Co.*, 112 N. Y., p. 1, held:

"By laws constitute regulations between the members, but a requirement in the legislative act containing the grant of general or special power *is a part of the grant* or contract between the state and the corporation * * *

"As agents of the corporation we must find the extent of their (directors) powers by an examination of the laws

under which it was created and exists. Those laws in defining the power of the corporation define the scope of the directors' powers to act for it."

Ins. Co. v. *Rudell*, 103 U. S., 337.

To same effect see:

Elevated Ry. Co. v. *Elevated Ry. Co.*, 11 Daly, 373; expressly approved in *Beveridge* v. *Ry. Co.*, *supra.*

Bank v. *Dandridge*, 12 Wheat., 78.

Twin Lick Oil Co. v. *Marbury*, 91 U. S., 587.

The Indiana act of 1883 expressly defines and limits the authority of the directors and makes it wholly dependent for existence and exercise upon the petition of the stockholders.

The word directors does not appear in the Kentucky act of 1880.

The Kentucky act of 1882 expressly and directly vests corporate power in the company by its corporate name and *not* in the directors to guarantee, to consolidate or to lease.

McShane v. *Carter*, 80 Cal., 312, involved a statute which made the authority of the directors to act dependent upon the action of the stockholders, the court held:

"*We think the provision of said act* GOES TO THE POWER OR AUTHORITY *of the directors.*"

If the Kentucky act adopted as a part of its alleged incorporation of petitioner's Indiana constituent the board of its constituent to represent and exercise this Kentucky corporate authority, then such Indiana directors must be

controlled by Indiana and not by Kentucky law, which would require the petition of the stockholders before special power to guarantee could be exercised.

The public—the purchasers of Beattyville bonds—were bound to take notice of this legislative grant of special power and could indulge no presumptions as substitutes for authority in the directors as special agents to "direct" the execution of the guaranty.

In *Davis* v. *Railway Company*, 131 Mass., 258, held:

"That the public is bound to take notice of the legal limitations of corporate capacity with the legal distinction between ordinary and extraordinary powers and of all limitations and restrictions upon the latter."

Spence v. *Railway Co.*, 79 Ala., 585.
Dudley v. *Whittier*, 46 Ala., 664.

In *Stillman* v. *Railway Company*, 27 Grat., 119, held:

"If they had not such notice it was their own fault.
Pierce v. *Ry. Co.*, *supra*.

XII.

If purchasers may, from the manual execution of a guaranty without recitals, presume that statutory conditions precedent to an authorized execution have been performed—that the stockholders had specially authorized the directors to " direct " such guaranty, then any limitation, restriction or qualification that the legislature might prescribe would be *wholly* unavailing.

(Op. Judge Barr Ex. F. to Pet.)

If this doctrine is sound, the result is so startling that a change in the law should occur without delay; but the contrary is the rule, and the necessity for its enforcement finds abundant support in the adjudicated cases, and nowhere more clearly stated than by Mr. Justice GRAY, in *Beveridge* v. *Ry. Co.*, 112 N. Y., 1.

" If it is deemed to be too extensive a power to be vested in the directors, and dangerous to the rights of the stockholders in possibility of fraud, it is for the legislature to interfere and prescribe regulations for its exercise."

The legislature did deem it " *too extensive a power to be vested in the directors*," and did regard its exercise by the directors as " *dangerous to the rights of the stockholders in the possibility of fraud*," and therefore the legislature did " *interfere and prescribe regulations*," etc.

What the legislature feared has occurred, through the holding of the Circuit Court of Appeals, " that this legislative grant of corporate power, and its exclusive vestment in the stockholders for exercise was a mere internal regulation," which holding, if not reversed by this court, will become the law of this court, and under

All the stockholders have done was to become incorporated and elect directors under the laws of its incorporation, and to repudiate the attempted guaranty promptly upon first notice.

In *Ernest* v. *Nichols*, 6 H. L. cases, p. 418, Lord WENSLEYDALE said:

" If they do not choose to acquaint themselves with the powers of the directors it is their own fault," etc.

In *McShane* v. *Carter*, 80 Cal., 312, held:

" Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under the corporate seal or not, etc."

The Circuit Court of Appeals deals with the Indiana statute as if it constituted special instructions issued by petitioner to its general agents.

In *Ernest* v. *Nichols*, *supra*, Lord WEDNESDALE said:

" The great body of shareholders, for whose protection these limitations are provided, cannot be affected unless they are complied with."

Fountain v. *Ry. Co.*, L. R. Eq. 5, 321.
Beveridge v. *Ry. Co.*, *supra.*
Lord v. *Y. F. G. Co.*, 99 N. Y., 547.

Adams v. *Trego*, 35 Mo.. 66, involved the act of a corporate agent: Held: " If powers like the present were construed as contended for by the appellee, there would be no safety for principals."

XIV.

THE GUARANTY ITSELF WAS SUFFICIENT NOTICE TO THE PURCHASER OF BONDS UPON WHICH IT WAS ENDORSED.

A purchaser of a negotiable note in usual form, executed by a corporation may presume that it was given for a debt of the maker, but suppose petitioner had issued its negotiable paper instead of its guaranty, on the face of which appeared the words, "this note is made for the accommodation of the Beattyville Company and to meet one of its obligations," and defendants had purchased the same, would it be held that they were innocent purchasers for value without notice?

In equally plain words the guaranty declared that it was a collateral contract executed for the bonded debt of the Beattyville Company.

Bank v. *Bank*, 95 U. S., 557, involved a guaranty endorsed upon a note or draft.

Mr. Chief Justice WAITE said:

"The very form of the paper itself carried notice to the purchasers the possible want of power to make the endorsement, and is sufficient to put him on guard."

To the same effect see

Lemoine v. *Bank*, 3 Dill., 44.
Hendrie v. *Berkowitz*, 37 Cal., 113.

Therefore purchasers were bound to take notice "of the possible want of power," *namely*, whether the stockholders had made the petition required in Section 3,951 *a* and *b*, which constituted the only authority—the *only* power of attorney under which the directors were authorized to act, and *without* which their act would be *wholly* unauthorized and void.

The difficulty in this case has arisen from the confusion of general and specific powers and general and special agents, and upon the theory that general authority to exercise general powers constituted an apparent authority to exercise special powers touching transactions *outside* of the usual or ordinary corporate business.

XV.

The prompt repudiation of the contract and guaranty was followed by the immediate commencement of this suit and the tender of the stock, which is the alleged consideration for the guaranty. A void contract ought not to be enforced, and it is contrary to equity to retain it. Equity will therefore cancel it.

Second Story Eq. Sec. 694–700.
R. R. v. *Shuyler*, 17 N. W., 592.
Sherin v. *Terry*, 36 Fed., 337.

That a guaranty of the character and form here involved was always open to the defenses existing against the first taker, see

Trust Co. v. *The Nat. Bk.*, 101 U., S. 70.

Petitioner has undoubted right both under the statutes and as repeatedly held by this court in its application of the general principles of commercial law to allege and show that the agents purporting to bind it, had in fact no authority to execute the guaranty because the statutory requirements did not exist. Therefore petitioner is entitled to the affirmance of the decree of the court below.

In conclusion, we respectfully urge that the review and decision by this court of the questions here presented are manifestly essential:

1st. To maintain harmony between the Circuit courts of appeal in their future decisions of like questions.

2d. To thereby furnish the federal courts a final and binding rule for their guidance and decision.

3d. To finally advise by the adjudication of this supreme judicial tribunal all investors in corporate stocks and bonds of their corporations, whether they may rely upon legislative restrictions and limitations upon directors and officers for their protection against unauthorized acts and spoliation of their corporate property.

4th. And with equal certainty to advise the public investing in guaranties that they cannot create special authority, or even appearance of authority by blind presumptions, which clearly entitle petitioner to the writ as prayed.

Respectfully submitted.

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